No. ~~107~~ 6

IN THE

Supreme Court of the United States

October Term, 1956

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of Columbia

REPLY TO MOTIONS TO AFFIRM

PETER T. BEARDSLEY
FRITZ R. KAHN
1424 16th Street, N. W.
Washington, D. C.
Attorneys for American Trucking Associations, Inc.

ROLAND RICE
ALBERT B. ROSENBAUM
1111 E Street, N. W.
Washington, D. C.
Attorneys for Regular Common Carrier Conference of A.T.A.

EUGENE L. COHN
1 No. LaSalle Street
Chicago, Illinois

JOSEPH E. LADDEN
2130 South Avenue
La Crosse, Wisconsin

STEPHEN ROBINSON
1020 Savings & Loan Bldg.
Des Moines, Iowa

HOMER E. BRADSHAW
REX H. FOWLER
510 Central National Bldg.
Des Moines, Iowa
Attorneys for Appellant Motor Carriers

INDEX

Table of Cases

PAGE

No. 101

IN THE

Supreme Court of the United States

October Term, 1956

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

REPLY TO MOTIONS TO AFFIRM

Come now appellants, American Trucking Associations, Inc., its Regular Common Carrier Conference, Iowa-Nebraska Transportation Company, Des Moines Transportation Company, Inc., Bruce Motor Freight, Inc., Western Transportation Company, McCoy Truck Lines, Inc., Brady Transfer and Storage Company, Motor Cargo, Inc., Gateway Transportation Company, and Bos Truck Lines, Inc., and in reply to the motions to affirm filed on behalf of the Interstate Commerce Commission and certain interveners in support of its order say to this Honorable Court:

PRELIMINARY

The picture of the legislative history of the 1938 amendments to the Motor Carrier Act painted in the Commission's Motion to Affirm (pp. 13-14) is grossly

inaccurate. To paraphrase the Commission's argument, Senator Shipstead attempted to have the language of the proviso of Section 213 inserted in Section 207, found that his proposed amendment was controversial, and, for this reason alone, withdrew it. And it follows, says the Commission, that Congress in 1938 thus squarely refused to require the Commission to restrict rail operation of motor vehicles to auxiliary and supplemental service when such authority is granted pursuant to an application filed under section 207, as distinguished from one filed under section 5. The Commission, of course, as pointed out in our Jurisdictional Statement, argued diametrically to the contrary before this Court in the *Rock Island case* in 1951.* Aside from this complete about-face in its interpretation of the governing statute, the Commission's argument on this point is disarmingly simple, but its simplicity is achieved only by conveniently overlooking the very significant testimony of Commissioner Joseph B. Eastman in connection with the 1938 legislation referred to, and indeed the very language of Senator Shipstead at the time he withdrew his proposed amendment. We deal now with these facets of the legislative history which the Commission's Motion to Affirm did not discuss.

1. Shipstead Amendment Was Deemed Unnecessary.

The Commission's discussion of the proposed amendment to Section 213 offered by Senator Shipstead during the 1938 hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 3606, a bill to amend certain provisions of the Motor Carrier Act, 1935, is completely misleading. At p. 13 of its Motion to Affirm the Interstate Commerce Commission points out that Senator Shipstead proposed an amendment which would have repeated in Section 207 the proviso of Section 213

* See pp. 15-16 of our Jurisdictional Statement, filed May 22, 1956.

(now Section 5(2)(b)) limiting railroads to the rendition of only auxiliary and supplemental motor-carrier service. The Commission then goes on to say:

> . . . Senator Shipstead withdrew his amendment for the reason that it appeared that the amendment would provoke a controversy and might delay the adoption of S. 3606 at that session. Sen. Rep. 1650, 75th Cong., 3d Sess., p. 3.
>
> Thus, in 1938, with specific knowledge of the Commission's view that the proviso of Section 5(2)(b) was not controlling in determining applications for motor carrier certificates under Section 207, Congress declined to avail itself of an opportunity to write the proviso into Section 207.

To be sure, Senator Shipstead was desirous of expediting the hearings and assuring the passage of S. 3606. However, a more objective reading of the legislative history than the Commission has undertaken reveals that the primary basis for the withdrawal of his proposed amendment was the testimony of Interstate Commerce Commissioner Joseph B. Eastman, then Chairman of the Commission's Legislative Committee. Commissioner Eastman's testimony clearly indicated that a proper interpretation of the statute required the Commission to read the proviso of section 213 into section 207 whenever a railroad or rail-controlled motor carrier sought to extend its operations under the latter section. To the extent, therefore, that any conclusions can be drawn from the legislative history of the 1938 amendments to the Motor Carrier Act, it is that Congress was satisfied that the Interstate Commerce Commission would apply the restrictive proviso of Section 213 to proceedings under Section 207, as well.

The purpose of the amendment was explained in an exchange between Senator Shipstead and Commissioner Eastman, as follows:

Senator Shipstead. Well, there has been an apprehension that the things prohibited in the act, so far as purchasing and acquiring are concerned, and the denial to purchase and acquire, can be secured in this way: That they can acquire indirectly, by a certificate, what they cannot otherwise acquire.

Commissioner Eastman. I think you mean that they could acquire a motor carrier and make the requisite proof under Section 213, and then could extend the operations of that motor carrier without making any such proof. And your proposed amendment, here, is intended to correct that situation.

Senator Shipstead. Yes; it is intended to clarify what seems to be a misunderstanding as to the act. I think the intention of Congress was perfectly plain. But the question has arisen. And in order to avoid any further controversy, this amendment is introduced. It would change the whole policy of the act, if they could proceed to acquire by certificate what they are not directly permitted to do. The question is whether that should be allowed to continue. (Hearings, pp. 28 and 29)

Commissioner Eastman stated that the Commission did not oppose the amendment, but he expressed some doubt that it actually was necessary in view of the Commission's probable construction of the pertinent provisions of the Act.

Commissioner Eastman. . . . We have indicated that it seems to us consistent with the policy now reflected in section 213(a), paragraph 1; that his amendment should be added to section 207(a).

In other words, if a railroad must submit special proof that the public interest will be promoted in certain respects, before it can acquire a motor carrier, it seems entirely consistent that it shall make such special proof when it seeks to extend the operations of a motor carrier which is already under its control. So we have no objection to offer to the amendment.

As a matter of fact, I think it could be argued, with a great deal of force that in interpreting and applying the provisions of section 207(a) as it now stands, the Commission should read the act as a whole and take cognizance of this policy which is now reflected in section 213(a)(1). (Hearings, p. 27)

. . . If I had to pass on the issue now, I should say that in administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same policy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of section 213.

Senator Johnson of Colorado: Under the present law?

Commissioner Eastman: Under the present law. (Hearings, p. 30)

The following day, relying on Commissioner Eastman's representation that his amendment was unnecessary, Senator Shipstead withdrew the amendment.

Senator Shipstead: . . . In view of the statement made by Commissioner Eastman for the Commission as to their view of this matter, and also his personal view, that he thinks the provision of this amendment is already in the law, and that——

Senator Johnson of Colorado (interposing): That is, you mean the Shipstead amendment?

Senator Shipstead: Yes; that is already in the law, and evidently he considers it unnecessary at the present time. So, in order to save the time of the subcommittee, and in order to facilitate advancing the Commission's recommendations for amendments to the Motor Carrier Act, I withdraw, for the present at least, the amendment I offered. I think we will stand on the Commission's point of view, and the personal view of Commissioner Eastman. (Hearings p. 141.)

Later that same year in the leading case of *Kansas City S. Transport Co., Inc., Com. Car. Application*, 10

M.C.C. 221, affirmed, 28 M.C.C. 5, the Commission *did* find that the principles and criteria applicable to acquisition proceedings under Section 213 were equally applicable to application proceedings under Section 207. Such construction was consistent with the Congressional intent and was neither more nor less than Commissioner Eastman led Senator Shipstead and the Subcommittee of the Senate Committee on Interstate Commerce to expect would be the Commission's construction.

2. Congress Was Advised of Restrictions.

The motion to affirm of the Interstate Commerce Commission continues, at pages 13 and 14, with the following misleading statement:

> Moreover, between the *St. Andrews Bay* case [*St. Andrews Bay Transp. Co. Extension of Operations*, 3 M.C.C. 711] and February 1940, the Commission at least twice reiterated its view that the proviso of Section 5(2)(b) was not rigidly controlling in cases under Section 207. *Interstate Transit Lines Extension—Yeakom, Nebraska*, 10 M.C.C. 665 (1938); *Santa Fe Trail Stages, Inc. Common Carrier Application*, 21 M.C.C. 725, 753 (1940). Nevertheless, in the general overhaul of the Interstate Commerce Act by the Transportation Act of 1940, Section 207(a) was not changed. We submit that this post-enactment legislative history is persuasive evidence that the Commission has interpreted correctly the will of Congress. *United States v. American Trucking Associations*, 310 U. S. 534, 549-550.

Contrary to the Commission's contention, neither the *Interstate* nor the *Santa Fe* case contains any language pertaining to the applicability of the proviso of Section 5(2)(b) to proceedings under Section 207. The requirements of the proviso that the railroad applicant's use of motor vehicles be in the public interest, enable it to use service by motor vehicle to public advantage in its operations and not unduly restrain competition are not even

mentioned. At best what these two cases stand for is the proposition that the approved motor-carrier operations need not be confined in every instance to the "territory parallel and adjacent to its rail lines" as might have been inferred from the Commission's decision in *Pennsylvania Truck Lines, Inc.—Control-Barker Motor Freight*, 1 M.C.C. 101, 113, affirmed, 5 M.C.C. 9. Thus in the *Interstate* case the Commission, Division 5, authorized service to a point "not served by either the Union Pacific Railroad Company or the Chicago and North Western Railway Company, which own and control applicant." 10 M.C.C. 667. And in the *Santa Fe* case the Commission, Division 5, approved the application of the Santa Fe's motor-carrier subsidiary even though "the applicant herein serves points not served by the Santa Fe Railway and that to some extent its extensions do not strictly parallel the Santa Fe rails."

In any event it is doubtful that Congress had any knowledge of the Commission's decisions in the *Interstate* and *Santa Fe* cases preceding the enactment of the Transportation Act of 1940. An examination of the Commission's annual reports to the Congress reveals that the Commission did not consider these cases of even sufficient importance to warrant their discussion in the reports. On the other hand a number of cases which could be cited to support the practice of the Commission of restricting railroad-affiliated motor carriers to the rendition of auxiliary and supplemental service were specifically called to Congress' attention prior to the enactment of the 1940 Act. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 432, 71 S. Ct. 382, 389. For example, the decision in *Kansas City S. Transport. Co., Inc., Com. Car. Application*, 10 M.C.C. 221, affirmed 28 M.C.C. 5, was discussed at page 107 of the 53rd Annual Report of the Interstate Commerce Commission, and that in *Pennsylvania Truck Lines, Inc. Control-Barker*,

1 M.C.C. 101, affirmed 5 M.C.C. 9, was discussed at pages 68 and 69 of the 51st Annual Report. Thus, if the post-enactment legislative history is persuasive evidence that the Commission properly interpreted the will of Congress, it is only because the Congress had been led to believe that it was the practice of the Interstate Commerce Commission to confine railroad operations of motor vehicles to the rendition of auxiliary and supplemental service whether pursuant to Section 213 (now Section 5(2)(b)) or Section 207.

3. Rock Island Case No Precedent for Commission's Action Here.

In support of the statement, made at page 17 of its motion to affirm, that it has been the "Commission's long-established view that in certificate cases under Section 207, the proviso of Section 5(2)(b) is a legislative policy to be taken into account, rather than a straitjacket," the Interstate Commerce Commission quoted from the *Rock Island* case, 340 U. S. 442, 71 S. Ct. 395, as follows:

> Rail affiliates have been permitted to leave the line of the railroad to serve communities without other transportation service. Those divergencies, however, are an exercise of the discretionary and supervisory power with which Congress has endowed the Commission. It is because Congress could not deal with the multitudinous and variable situations that arise that the Commission was given authority to adjust services within the limits of the Motor Carrier Act.

However, the Interstate Commerce Commission neglected to quote the next sentence which concluded the paragraph from which the quotation was taken, as follows:

> The Commission has continually evidenced, as indicated above, by opinion and certification its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads.

It is the Commission's unwarranted and unlawful departure from this established practice that is the one major point of contention in the instant proceeding.

Even some of the cases cited by the Interstate Commerce Commission and the interveners in its behalf in support of their argument that the Commission's disposition of Motor Transit's application in this proceeding was not at variance from previous policies or practices reflect the Commission's concern lest the railroads or their affiliates operate motor vehicles in unrestricted, competitive service. Thus in *Santa Fe Trail Transp. Co. Extension—Joplin*, 44 M.C.C. 474, 481, the Commission specifically restricted certain authorized operations "to service which is auxiliary to, or supplemental of rail service" and other operations by reserving the right to impose "such specific conditions as we in the future may find it necessary to impose in order to restrict applicant's operation to service which is auxiliary to, or supplemental of, rail service." In *Santa Fe Trails Stages, Inc. —Control-Central Arizona*, 1 M.C.C. 225, 231, the Commission, Division 5, deemed the grant of authority to result in "an operation auxiliary and supplementary to its rail operations." In *Santa Fe Trail Stages, Inc., Com. Car. App.*, 21 M.C.C. 725, 753, the Commission, Division 5, said of the proposed operations, "Coordination, such as that proposed, has been advocated and encouraged by the Commission and students of the transportation problem for a long time." In *Clinton, Davenport & Muscatine Ry. Co.—Ext.—Davenport—Clinton*, 24 M.C.C. 250, 251, the Commission, Division 5, noted that "the proposed operation will take the place of an interurban electric railway freight service . . ." And finally in *Burlington Transp. Co. Ext.—Council Bluffs*, 28 M.C.C. 783, 790 the Commission, Division 5, observed that "when operations are commenced over the entire route applicant proposes to utilize the station facilities of the railroad, and coordinate the service with that of the railroad."

In only a handful of cases has the Commission even attempted to carve out exceptions to the clearly-expressed Congressional policy that railroad applicants may be authorized to conduct trucking operations only in auxiliary and supplemental service. Essentially these were uncontested proceedings before the Commission, and in not a single instance known to these appellants was the Commission's decision in such a case subjected to judicial review. These cases fall largely into three clearly-defined categories,* into which virtually all of the balance of cases cited in the motions to affirm can readily be grouped:

1. Where truck service is to be rendered to a point not on the line of the railroad and not adequately served by any other railroad or motor carrier. *Santa Fe Trail Transp. Co.—Purchase—Johnson*, 45 M.C.C. 653, 660; *Southern Pac. Transport Co.—Purchase—Reynolds*, 45 M.C.C. 617, 621; *Interstate Transit Lines, Ext.—Verdon, Nebraska*, 10 M.C.C. 665, 667; *St. Andrews Bay Transp. Co. Extension of Operations*; 3 M.C.C. 711, 716.

2. Where truck service is to be rendered over a short and insignificant extension and the existing truck service to which it will be tacked already is subject to appropriate restrictions. *Santa Fe Trail Transp. Co. Extension—New Mexico Points*, 48 M.C.C. 85; *Texas & Pac. Motor Transport Co. Ext.—Point Blue, La.*; 47 M.C.C. 425; *Rock Island Motor Transit Co. Ext.—Wellman, Iowa*, 31 M.C.C. 643.

3. Where the truck service, together with other motor carrier operations, will constitute the major portion of the applicant's business, the rail service having become unimportant. *ET & WNC Transportation Company—Control—The Inter City Trucking*

* A fourth group appears to have resulted from a tendency, corrected by the Commission's report in the *Rock Island case, supra*, at 40 M.C.C. 469, "to treat the Barker case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the service which might be rendered by a railroad or its affiliate under any acquired right."

Company, 60 M.C.C. 620; *ET & WNC Transportation Co.—Purchase—Huckaber*, 56 M.C.C. 50; *Louisville, N. A. & C. R. Co.—Purchase—Meerman*, 45 M.C.C. 6.

Clearly the all-out truck operations here authorized to be conducted by Motor Transit between Chicago and Omaha, serving such additional major points as Cedar Rapids and Des Moines, cannot be squeezed into any one of the three limited categories of unrestricted motor carrier authority heretofore awarded by the Commission to rail applicants. Such a grant clearly is contrary to the very practice of the Commission established over years of carrying out the Congressional intent of limiting railroads to the rendition of auxiliary and supplementary motor service.

4. The So-Called "Restrictions" Which The Commission Has Imposed Herein Are Meaningless.

The Interstate Commerce Commission's motion to affirm, at page 22, argues that "it should not be overlooked that the Commission has imposed two conditions upon the motor carrier operating authority which it has given to Motor Transit." These conditions are meaningless; neither is adequate to insure the rendition of auxiliary and supplemental service, either at present or at some time in the future.

The first of the conditions—"that there may be attached from time to time the privileges granted herein such reasonable terms, conditions, and limitations as the public convenience and necessity may require"—virtually repeats verbatim the statutory language of Section 208(a) of the Act, 49 U.S.C. § 308(a). No greater authority is conferred by the reservation than the Commission otherwise would have. Auxiliary and supplemental restrictions could not be imposed in the future, for their imposition would be tantamount to a suspension, change or revocation of the operating authority previously granted

by the Commission. The only statutory authority for the suspension, change or revocation of a certificate is contained in Section 212(a), 49 U.S.C. § 312(a). *Watson Bros. Transportation Co.* v. *United States*, 132 F. Supp. 905, affirmed, — U.S. —, 76 S. Ct. 302. The requirement of that section that there must have been a willfull violation of the Act or a Commission order before revocation cannot be reconciled with the Congressional intent expressed in the National Transportation Policy and the proviso of Section 5(2)(b) requiring the Commission, *in any event*, to restrict motor operations by railroads or their affiliates to auxiliary and supplemental service.

The other restriction imposed—"that all contractual arrangements between the Rock Island Motor Transit Company and the Chicago, Rock Island and Pacific Railroad Company shall be reported to us and shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties"—is equally impotent. The Interstate Commerce Commission, at page 23 of its motion to affirm, says, "the validity of this condition was sustained in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 436-444." However, these appellants on rereading the *Rock Island* decision are unable to find any discussion of the restriction and its relationship to the limitation of railroads and their affiliates to insure the rendition of auxiliary and supplemental service. We have found however, that the Interstate Commerce Commission, in referring to the reporting requirement, has said, "In matters relating to compensation between the two companies, the railroad will in reality be dealing with itself and, so far as ultimate financial results to it are concerned, it is immaterial what these arrangements may be. . . . Such information might be important in a rate proceeding or otherwise." *Frisco Transp. Co. Extension—Joplin—Miami*, 62 M.C.C. 367, 379; *Texas &*

Pacific Motor Transport Co. Com. Car. Application, 47 M.C.C. 753, 763. The ability in the future to enforce an appropriate bookkeeping transaction, we are sure, is not what was had in mind when the Commission undertook the practice of imposing auxiliary and supplemental restrictions in response to the Congressional intent of limiting railroad motor-carrier operations. To jettison the other, more meaningful restrictions, keeping only the restriction that may or may not be of some academic interest and adding a restriction which merely repeats certain statutory authority, cannot be deemed to accomplish the legislative purpose. The restrictions imposed do not, and cannot, insure that the Chicago, Rock Island and Pacific Railway Company will use the motor-carrier authority conferred upon its subsidiary, The Rock Island Motor Transit Co., to public advantage in its train operations, and yet under the National Transportation Policy and the provisions of the Interstate Commerce Act that is the limited extent to which it properly may operate motor vehicles for hire in interstate and foreign commerce.

Wherefore, it is again urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to the District Court for disposition consistent with the Supreme Court's opinion.

Respectfully submitted,

PETER T. BEARDSLEY
FRITZ R. KAHN
1424 16th Street, N. W.
Washington, D. C.
Attorneys for American Trucking Associations, Inc.

ROLAND RICE
ALBERT B. ROSENBAUM
1111 E Street, N. W.
Washington, D. C.
Attorneys for Regular Common Carrier Conference of A.T.A.

EUGENE L. COHN
1 No. LaSalle Street
Chicago, Illinois

JOSEPH E. LUDDEN
2130 South Avenue
La Crosse, Wisconsin

STEPHEN ROBINSON
1020 Savings & Loan Bldg.
Des Moines, Iowa

HOMER E. BRADSHAW
REX H. FOWLER
510 Central National Bldg.
Des Moines, Iowa
Attorneys for Appellant Motor Carriers.

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the tenth day of July, 1956, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Oliver Gasch, United States Attorney for the District of Columbia, at Room 3600-A, United States Court House, Washington, D. C., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Rock Island Motor Transit Company, Employees' Committee of Rock Island Motor Transit Co., Davenport Chamber of Commerce, et al., and Shippers' Committee, intervening defendants, by mailing copies in a duly addressed envelope, with postage prepaid, to Arthur L. Winn, Jr., Esq., their attorney, at 743 Investment Bldg., Washington, D. C.

4. On the Railway Labor Executives' Association, Brotherhood of Railroad Trainmen, and Order of Railway Conductors and Brakemen, intervening plaintiffs, by mailing copies, in a duly addressed envelope, with postage prepaid, to James L. Highsaw, Jr., their attorney, at 620 Tower Bldg., Washington, D. C.

PETER T. BEARDSLEY